89- 1581

No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES FIDELITY and GUARANTY COMPANY,
Petitioner,

v.

ANNE ANDRAKE URETA, widow of SEGISMUNDO Z. URETA, individually and on behalf of her minor children, SEAN URETA and STEVEN URETA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 10, 1990

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QUESTIONS PRESENTED

A. Whether the Fifth Circuit erred in relying on state court jurisprudence to hold, without conducting the summary judgment analysis required by Fed.R.Civ.P. 56 and this Court's recent jurisprudence, that the material fact issue in this case (whether a party is within the course and scope of business so as to be covered by partnership insurance policies) necessarily presented a fact issue rendering erroneous the district court's grant of summary judgment.

B. Whether the Fifth Circuit erred in ignoring the analysis required by this Court's recent summary judgment rulings and in reversing the district court's grant of summary judgment in favor of United States Fidelity and Guaranty Company ("USF&G") where the uncontradicted evidence on the material fact issue resolved this issue in favor of USF&G, and where respondent's opposing evidence constituted nothing more than speculative and self-serving, "metaphysical doubt" affidavit evidence.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioner-defendant, USF&G and respondent-plaintiff Anne Andrake Ureta, widow of Segismundo Z. Ureta, individually and on behalf of her minor children, Sean Ureta and Steven Ureta. Additional defendants in the district court, all of whom have settled and are no longer parties to this case, were Kathy Thompson, individually and as administratrix of the estate of her minor child, Matthew D. Browne, Prudential Property & Casualty Company, and State Farm Automobile Insurance Company.

Petitioner, United States Fidelity and Guaranty Company, certifies, pursuant to Rule 29.1, that it is a subsidiary of USF&G Corporation. The subsidiaries of petitioner within the meaning of Rule 29.1 are:

Fidelity and Guaranty Insurance Company;
Fidelity and Guaranty Insurance Underwriters, Inc.;
Capital Guaranty Corporation;
Capital Re Corporation; and
Credit Re Corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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No. 89-

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, United States Fidelity & Guaranty Company ("USF&G"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this case on January 25, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 892 F.2d 426, and is reprinted in the appendix hereto, pp. 1a-8a, *infra.*

The opinion and order of the United States District Court for the Eastern District of Louisiana is unpub-

lished and is reprinted in the appendix hereto, pp. 9a-16a, *infra*. The district court's "Rule 54(b) Judgment" is reprinted in the appendix hereto, pp. 17a-18a, *infra*. The district court's order refusing to reconsider its order granting summary judgment is reprinted in the appendix hereto, pp. 19a-20a, *infra*.

JURISDICTION

Invoking the federal removal statute, 28 U.S.C. § 1441, and federal diversity jurisdiction, 28 U.S.C. § 1332, petitioner removed this lawsuit on June 19, 1987 from the Civil District Court for the Parish of Orleans, State of Louisiana, to the United States District Court for the Eastern District of Louisiana.

The district court granted petitioner's motion for summary judgment in an opinion and order entered on November 18, 1988 (Appendix, pp. 9a-16a). The district court granted final judgment pursuant to Fed.R.Civ.P. 54(b) on November 28, 1988 (Appendix, pp. 17a-18a). Respondent timely appealed the district court's judgment pursuant to 28 U.S.C. § 1291 by filing notice of appeal on December 22, 1988.

The United States Court of Appeals for the Fifth Circuit rendered its judgment and opinion on January 25, 1990, reversing the district court's grant of summary judgment (Appendix, pp. 1a-8a). Petitioner obtained an extension of time to file a petition for rehearing and a suggestion for rehearing *en banc* until and including February 22, 1990 (Appendix, p. 21a). Petitioner timely filed both a petition for rehearing and a suggestion for rehearing *en banc* on February 22, 1990. The Court of Appeals denied both the petition and the suggestion on March 12, 1990 (Appendix, pp. 22a-23a).

Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1), by filing this petition within the ninety day time period provided by 28 U.S.C. § 2101(c) and this Court's Rule 13.1.

STATUTES INVOLVED

Fed.R.Civ.P. 1, 56, and 81(c) are implicated in this case. The full text of these rules is set forth in the Appendix, *infra*, pp. 43a-46a.

STATEMENT OF THE CASE

On July 13, 1986, Segismundo Z. Ureta, M.D., died in a near-head-on automobile collision on the Greater New Orleans Mississippi River Bridge after an eastbound motorist crossed over the center emergency lane into Dr. Ureta's westbound vehicle, killing Dr. Ureta almost instantly. At the time of the accident, Dr. Ureta and respondent, Mrs. Ureta, were travelling in Dr. Ureta's personal automobile en route to a birthday party for a friend's son.

At all pertinent times, Dr. Ureta was an employee of the professional medical corporation, "Dr. Segismundo Z. Ureta, APMC." This professional medical corporation, in turn, was a partner in the Browne-McHardy Clinic, a medical partnership composed of individual doctors and professional medical corporations. USF&G issued two policies of insurance to the Browne-McHardy Clinic, both containing uninsured motorist coverage, under which respondent, Dr. Ureta's widow, now seeks to recover. USF&G contends that these policies provided no such coverage to Dr. Ureta with regard to the accident in question.

Mrs. Ureta originally filed her lawsuit in state court on May 11, 1987. However, as she was diverse in citizenship from all of the defendants and as the amount of her claim exceeded the requisite jurisdictional amount (then $10,000), USF&G invoked the federal removal statute, 28 U.S.C. § 1441(a), and federal diversity jurisdiction, 28 U.S.C. § 1332, to remove her lawsuit to the United States District Court for the Eastern District of Louisiana.

On December 21, 1987, USF&G filed its first motion for summary judgment (R.1, 137-85). Mrs. Ureta opposed the motion (R.1, 102-36), and additionally filed a cross-motion for summary judgment on the question of insurance coverage (R.1, 20-38). On February 24, 1988, the district court heard oral argument on the cross motions (R.2, 456). The court ordered "both motions DENIED at this time," believing that summary judgment was premature at that time (*id.*).

After substantial discovery had been taken, USF&G filed a second motion for summary judgment on November 1, 1988 (R.3, 678). Mrs. Ureta again filed a cross-motion for summary judgment (R.3, 613-25).

In support of its motion, USF&G submitted, together with the policies and other evidence, excerpts from Mrs. Ureta's deposition. In this deposition (copies of the relevant pages reproduced in the Appendix hereto, pp. 24a-30a), Mrs. Ureta testified that at the time of the accident, she and Dr. Ureta were travelling to a birthday party for a friend's son (*id.*). She further explained that her husband was not on call that day and was not carrying a "beeper," that no one associated with the clinic knew where they were, and that he could not be reached for business until he returned home (*id.*). She unequivocally testified that the birthday party to which they were going was purely a social event with no connection to Dr. Ureta's business with Browne-McHardy Clinic (*id.*).

In opposition to this evidence, Mrs. Ureta introduced a number of affidavits, the full text of which are reproduced in the Appendix at pages 31a-42a. The Fifth Circuit's decision (Appendix, pp. 2a-3a; 892 F.2d at 428) stated that in these affidavits, "Mrs. Ureta stated that a purpose in Dr. Ureta's attending the birthday party was related to his work with the Browne-McHardy Clinic." However, these affidavits contain no such statement. *See* Appendix, pp. 31a-42a. Rather, the information contained in these affidavits is as follows.

Mrs. Ureta submitted two post-deposition affidavits. In her first affidavit (Appendix, pp. 35a-36a), she generally opined that her husband as a physician was always available to render medical services, whether or not he officially was "on call." In a supplemental affidavit (Appendix, p. 37a), she stated that her husband was active in the Filipino community and belonged to several Filipino organizations. Neither of these affidavits contradicted her positive and unequivocal testimony that the birthday party to which they were travelling was a purely social event with no connection to Browne-McHardy business. *See* Appendix, pp. 26a-30a.

Additionally, Mrs. Ureta submitted the affidavits of two doctors, John T. Patterson, M.D. (Appendix, pp. 31a-32a) and Keith E. Larkin, M.D. (Appendix, pp. 33a-34a). These two doctors averred in nearly identical affidavits that they were partners at Browne-McHardy Clinic, that socialization is important to creating good will for the clinic, and that such social activities are important in developing business for the Clinic (*id.*). However, neither of these affidavits contradicted Mrs. Ureta's unequivocal testimony that at the time of the accident she and Dr. Ureta were travelling to a purely social birthday party and were not engaged in Browne-McHardy business.

Finally, Mrs. Ureta submitted the affidavits of five individuals (Appendix, pp. 38a-42a) that generally averred that Dr. Ureta had many Filipino patients, including many of these affiants, and that he had substantial contacts with the Filipino community. None of these affidavits offered any specific insight into the nature of Dr. Ureta's activities at the time of the accident. Furthermore, none of these affidavits speculated as to Dr. Ureta's intended purpose of attending the party.

On November 17, 1988 (entered November 18, 1988), the district court issued a minute entry "Opinion and Order," granting USF&G's motion and denying Mrs. Ureta's cross-motion (Appendix, pp. 9a-16a). The dis-

trict court found throughout its opinion that Mrs. Ureta's testimony that she and her husband were using his personal automobile to travel to a "purely social" birthday party and that Dr. Ureta was not engaged in clinic business was uncontradicted (*id.*). It evaluated the pertinent policy provisions in light of Mrs. Ureta's uncontradicted testimony, finding that the policy provided no coverage, because Dr. Ureta was not conducting partnership business at the time of his accident (*id.*). In reaching its conclusion that summary judgment should be granted, the district court analyzed the case in light of this Court's recent jurisprudence interpreting Fed.R.Civ.P. 56 (*id.*).

On November 28, 1988, pursuant to Fed.R.Civ.P. 54 (b), the Court entered a final judgment dismissing USF&G from the lawsuit (Appendix, pp. 17a-18a). On that same date, Mrs. Ureta filed a "Motion for Reconsideration." The district court denied this motion with written reasons on December 8, 1988 (entered December 9, 1988) (Appendix, pp. 19a-20a). Mrs. Ureta then appealed the district court's judgment to the United States Court of Appeals for the Fifth Circuit.

The Fifth Circuit issued its opinion on January 25, 1990, reversing the district court's summary judgment and remanding the case. The Fifth Circuit agreed with the district court that the crucial question in determining whether coverage was provided by these policies, and whether summary judgment should be granted, was whether Dr. Ureta was engaged in Browne-McHardy partnership business (Appendix, pp. 5a-6a; 892 F.2d at 429). However, despite Mrs. Ureta's own uncontradicted testimony that the birthday party to which she and her husband were travelling was a purely social event having no connection to clinic business, and ignoring the total absence of evidence to the contrary, it concluded that whether Dr. Ureta was to be engaged in Browne-McHardy business at the birthday party presented "a genuine issue of material fact precluding summary judg-

ment." (Appendix, pp. 5a-7a; 892 F.2d at 429). In reaching this conclusion, the Fifth Circuit in a footnote invoked several Louisiana state cases allegedly holding that the question whether a party is within the course and scope of his employment at the time of an accident is a question of fact that precludes the grant of summary judgment. (Appendix, pp. 5a-6a and n.7; 892 F.2d at 429 and n.7).

USF&G timely filed a petition for rehearing and suggestion for rehearing en banc with the Fifth Circuit on February 22, 1990. That court denied the petition and the suggestion on March 12, 1990 (Appendix, pp. 22a-23a).

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S OPINION AND JUDGMENT REVERSING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF USF&G DIRECTLY CONTRAVENES FED.R.CIV.P. 56 AND THIS COURT'S RECENT JURISPRUDENCE INTERPRETING THAT RULE

This Court should grant a writ in this case because the Fifth Circuit's decision ignores and conflicts with the decisions of this Court in *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electrical Industrial Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Additionally, the Fifth Circuit's decision improperly invoked state procedural law in determining that the district court erred in granting summary judgment.

In *Celotex*, this Court found that Fed.R.Civ.P. 56(c) "*mandates* the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322 (emphasis supplied). The Court further held that once the moving party demonstrates the absence of a material fact by reference to

the pleadings, depositions, answers to interrogatories, and admissions on file, the nonmoving party bears the burden of designating *specific facts* demonstrating a genuine issue with regard to a material fact. *Id.*, 477 U.S. at 323-24 (emphasis supplied).

In *Anderson*, this Court emphasized that the mere existence of some disputed factual matters does not defeat a motion for summary judgment; only disputes over facts that are *material*, that is, over facts that affect the outcome of the suit under the governing law, will preclude the district court from granting summary judgment. *Anderson*, 477 U.S. at 247-48.

In *Matsushita*, the Court described the extent of the opposing party's burden: "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita*, 475 U.S. at 586-87 (emphasis in original).

The district court, in granting summary judgment, extensively discussed and relied upon these decisions (Appendix, pp. 10a-11a). Furthermore, these three decisions, and the rule of law they establish were extensively briefed before the Fifth Circuit. Nevertheless, the Fifth Circuit, save footnote references to *Anderson* (*see* Appendix, p. 4a, nn.3, 4; 892 F.2d at 428 nn.3, 4), totally ignored these benchmark cases. Rather than analyzing the facts presented by the depositions, affidavits, and other summary judgment evidence in light of these three decisions as did the district court, the Fifth Circuit concluded, without any real analysis of the summary judgment evidence, that the question–whether a party is engaged in company business at the time of his accident "presents a genuine issue of material fact precluding summary judgment." Appendix, p. 5a; 892 F.2d at 429 (footnote omitted). The appellate court supported this statement with a footnote invoking several Louisiana state

cases purporting to support this proposition. (Appendix, pp. 5a-6a and n.7; 892 F.2d at 429 and n.7).

Assuming that this case involves any material fact issue,[1] the Fifth Circuit, like the district court, correctly identified this issue as whether Dr. Ureta was to perform Browne-McHardy business at the birthday party. If Dr. Ureta was not conducting "company" business, he could not be covered for this accident under the USF&G business insurance policies, and USF&G would be entitled to summary judgment as a matter of law. However, unlike the district court, the Fifth Circuit relied on state law to improperly *assume* that the mere existence of this material fact issue, without regard to whether it was disputed, precluded the grant of summary judgment.

This case is before a *federal court* and is governed by *federal procedural law*, not by the Louisiana state cases cited by Fifth Circuit (Appendix, pp. 5a-6a and n.7; 892 F.2d at 429 and n.7) concerning when summary judgment is appropriate. *See* Fed.R.Civ.P. 1 (quoted below, Appendix, p. 43a, defining the scope of the rules as governing "procedure in the United States district courts in all suits of a civil nature . . ." with some exceptions inapplicable here); Fed.R.Civ.P. 81(c) (quoted below, Appendix, pp. 45a-46a, specifically providing that the Fed-

[1] USF&G contends that this case involves no material fact issue and that it is entitled to judgment as a matter of law because Dr. Ureta could not, as a matter of law, have been an insured under the policy even if one assumes he was conducting "company" business at the time of the accident. Dr. Ureta was employed by his professional medical corporation. He was not an employee or partner of the insured clinic partnership. Rather, his medical corporation was the clinic partner. Thus, as a matter of law, Dr. Ureta personally could only conduct the business of his medical corporation, which in turn conducted the business of the partnership. As a purely legal matter, Dr. Ureta individually could not have been directly conducting the business of the insured partnership, and thus, could not have been entitled to coverage under the partnership's insurance policies.

The Fifth Circuit's ruling to the contrary ignores the corporate status that Dr. Ureta voluntarily created to find a material fact issue that does not exist in this case.

eral Rules of Civil Procedure apply to actions removed from state courts); *Hanna v. Plumer*, 380 U.S. 460 (1965) (noting that, except where inconsistent with the Constitution or the Rules Enabling Act, the Federal Rules of Civil Procedure apply in federal court, even where the federal rule alters the method of enforcing a state right); *Raitt v. Seltzer*, 10 F.R.D. 48 (N.D.N.Y. 1950) (specifically holding that Fed.R.Civ.P. 56, not state law, governed a motion for summary judgment in a case removed from state court); *see also*: *Anderson v. Liberty Lobby*, *supra* (applying Rule 56 in a federal diversity case); *Celotex v. Catrett*, *supra* (applying Rule 56 in a federal diversity case); *cf. Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers*, 415 U.S. 423, 437 (1974) (noting that once a case is removed, federal law, and not state law, governs the future course of proceedings). Thus, even if state summary judgment law would preclude the granting of summary judgment on the issue whether a party was in the course or scope of his business or employment (Louisiana law does not), this *state* procedure does not apply to this *federal* case.

Furthermore, as Fed.R.Civ.P. 56 and this Court's jurisprudence make clear, summary judgment is not precluded merely because decision of the case involves a fact issue. Federal procedural law, which the Fifth Circuit, like the district court, was bound to follow, provides that summary judgment is only improper where there is a *genuine* dispute concerning the material fact issue. Summary judgment *must* be granted where the party opposing summary judgment fails to designate *specific facts* showing a genuine dispute regarding the material fact issue. *Celotex*, 477 U.S. at 323-24. The Court held in *Matsushita* that once the material fact is established by positive, concrete evidence, speculative and tentative "metaphysical doubt" evidence is insufficient to defeat the motion. *Matsushita*, 475 U.S. at 586-87.

Had the Fifth Circuit engaged in the analysis required by Rule 56 and this Court's jurisprudence, it, like the

district court, would have concluded that USF&G was entitled to summary judgment.

Respondent, Mrs. Ureta, who was in the automobile with her husband at the time of the accident, unequivocally testified: (1) that she and her husband were travelling to a purely social birthday party at the time of the accident; (2) that this party had nothing to do with her husband's business; and (3) that he was not carrying a beeper and was not on call and could not be reached for business purposes until he returned home (Appendix, pp. 26a-30a).

Faced with her *positive* testimony, respondent presented affidavits (summarized in more detail at p. 5, above) indicating: (1) that her husband, even when not on call, was always "available" to render medical services; (2) that her husband was active in the Filipino community; (3) that socialization may create good will for the clinic; (4) that Dr. Ureta had many Filipino patients, including some patients in the Filipino community. None of these affidavits, including Mrs. Ureta's own two post-deposition affidavits, contradict her positive testimony that the particular birthday party to which she and her husband were travelling was a *purely social event*, with no connection to Browne-McHardy Clinic or clinic business.

As the district court implicitly concluded, in light of Mrs. Ureta's positive testimony, her conjectural affidavits do not point out specific facts demonstrating a genuine dispute as to the material fact issue. They present nothing more than speculative, "metaphysical doubt" evidence that this Court has found insufficient to defeat a motion for summary judgment. *Matsushita*, 475 U.S. at 586-87. Contrary to the Fifth Circuit's footnote suggestion (Appendix pp. 5a-6a, n.7), there are no disputed inferences conflicting her positive and unequivocal testimony to be drawn from the summary judgment evidence.

This case is important to the law of summary judgment. If allowed to stand, it will provide authority to

district courts to ignore the plain mandate of Rule 56 and this Court's recent summary judgment jurisprudence, and to deny summary judgments without conducting the analysis required by federal procedural law. The Fifth Circuit's decision sanctions denying summary judgment motions merely because a case presents a material fact issue, without regard to whether there is any real dispute as to that fact issue. It provides authority for federal courts to look to state jurisprudence, rather than Rule 56, to perfunctorily deny summary judgment motions, even where there is no dispute to the material fact issue in the case.

Finally, this case is important to USF&G. Although there is no *genuine* dispute as to the material facts regarding coverage, and although USF&G is entitled to judgment as a matter of law, the Fifth Circuit's ruling, if not reviewed and reversed, will subject USF&G to the expense of a trial before a jury where no such trial should ever commence.

CONCLUSION

The decision of the Fifth Circuit clearly is contrary to the mandate of Fed.R.Civ.P. 56 and the recent jurisprudence of this Court interpreting that rule. For the reasons set forth above, petitioner submits that the Court should grant a writ of certiorari.

Respectfully submitted,

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April 10, 1990

APPENDICES

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3938

ANNE ANDRAKE URETA, Widow of
SEGISMUNDO Z. URETA, Individually, Etc.,
Plaintiff-Appellant,

v.

KATHY THOMPSON, Individually and as Administratrix
of the Estate of Her Minor Child, *et al.*,
Defendants,

UNITED STATES FIDELITY & GUARANTY COMPANY,
Defendant-Appellee.

Jan. 26, 1990

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

WISDOM, Circuit Judge:

In this diversity case, the plaintiff/appellant's husband, Dr. Segismundo Z. Ureta, was killed on July 13, 1986, when a vehicle driven by Matthew Browne crossed over

the center line of the Mississippi River Bridge and struck Dr. Ureta's vehicle head-on. The plaintiff, Anne Andrake Ureta, filed suit against a number of parties including United States Fidelity & Guaranty Company (USF & G) seeking recovery for the wrongful death of her husband.

Mrs. Ureta contends that the Business Auto Policy and Comprehensive Excess Policy issued by USF & G to the Browne-McHardy Clinic [1] provides coverage for this accident. USF & G argued in a motion for summary judgment that Dr. Ureta and his automobile were not covered under the USF & G policies for the accident in question. The district court denied that motion for summary judgment and discovery proceeded. After discovery had progressed, USF & G filed a second motion for summary judgment. The district court granted that second motion and, on November 28, 1988, entered a final judgment dismissing USF & G from the lawsuit. Mrs. Ureta appeals from that grant of summary judgment and the dismissal of USF & G.

We reverse. The outcome of this case turns on a genuine issue of material fact. We remand the case to the district court for determination of that factual issue and for appropriate judgment.

I

At the time of the accident, Dr. Ureta was traveling in a car registered in his name. He was on the way, with Mrs. Ureta, to the birthday party of a friend's son. At her deposition, Mrs. Ureta testified that her husband was not to be on call at the birthday party. In affidavits prepared after her deposition, however, Mrs. Ureta stated that a purpose in Dr. Ureta's attending the birthday

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[1] The Browne-McHardy Clinic is a professional medical partnership of which Dr. Ureta's professional medical corporation was a partner.

party was related to his work with the Browne-McHardy Clinic. The professional element of his attendance at the birthday party, she stated, concerned his developing patient referrals within the Filipino community. Mrs. Ureta submitted affidavits of doctors in the Browne-McHardy Clinic and other individuals who attended the birthday party stating that such social events are an important means by which doctors of the Browne-McHardy Clinic create good will and generate business for the Clinic.

The Browne-McHardy Clinic is a partnership of medical practitioners. Dr. Ureta, like some other partners of Browne-McHardy, was not an individual partner of Browne-McHardy; rather, Segismundo Z. Ureta, A Professional Medical Corporation (Ureta, APMC), was a partner in the Clinic and Dr. Ureta was an employee of Ureta, APMC.

The USF & G insurance policies at issue in this case were issued to Browne-McHardy Clinic as the named insured. Mrs. Ureta presents a number of different theories under which, she argues, Dr. Ureta should be covered by those policies.

II

This Court, in reviewing the grant of a summary judgment motion, reviews the motion *de novo* using the same criteria used by the district court in the first instance.[2] As stated in Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Material facts" are facts that

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[2] *See In re Aircrash at Dallas/Fort Worth Airport*, 861 F.2d 814, 815-16 (5th Cir. 1988); *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

might affect the outcome of the suit under the governing law.[3] A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for either party.[4]

III

Mrs. Ureta argues that Dr. Ureta was covered under the USF & G policies as an additional insured and also that Dr. Ureta's vehicle was a covered vehicle. In arguing that Dr. Ureta was an additional insured under the policies, Mrs. Ureta contends that Dr. Ureta was a partner in the Browne-McHardy Clinic and that, as such, he was an additional insured listed on an endorsement stating that partners of the Clinic are added to the policy. Dr. Ureta, as an individual, however, was not listed as a partner of Browne-McHardy. Rather, Dr. Ureta's professional corporation (Ureta, APMC) was a partner of Browne-McHardy. Dr. Ureta, therefore, was not personally covered as an additional individual insured.

Mrs. Ureta also argues that Dr. Ureta's vehicle was a covered vehicle. The declaration page of the USF & G policy states that liability insurance[5] is provided for automobiles designated as "specifically described autos", "hired autos", and "non-owned autos".

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[3] *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986).

[4] *See id.* 477 U.S. at 248, 106 S.Ct. at 2510, 91 L.Ed.2d at 211-12.

[5] The liability policies include uninsured motorist coverage. Louisiana's uninsured motorist statute states that,

> [N]o automobile liability insurance . . . shall be delivered . . . in this state . . . unless coverage is provided . . . in not less than the limits of bodily injury liability provided by the policy . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury . . . including death, resulting therefrom; provided, however, that the coverage required . . . shall not be applicable

"Specifically described autos" are defined in the policy as only those autos described in item 4 of the policy. Since the 1987 Nissan Maxima that Dr. Ureta was driving when the accident occurred was not described in item 4, it was not covered as a specifically described auto under the policy.

"Hired autos" are defined in the policy as automobiles that "you" hire, lease, or borrow. "You" is defined in the policy as referring to the named insured, in this case Browne-McHardy Clinic. If, as Mrs. Ureta alleges, her husband was to perform Browne-McHardy business at the birthday party, then the vehicle in which he was driving could be considered a vehicle borrowed from Dr. Ureta by Browne-McHardy. As a borrowed automobile, it would be covered under the hired autos section of the USF & G policy.[6] Thus, whether Dr. Ureta's car was, at the time of the accident, a covered vehicle under the "hired autos" section of the policy, depends upon whether Dr. Ureta was to be engaged in Browne-McHardy business at the birthday party. That question presents a genuine issue of material fact precluding summary judgment.[7]

> where any insured . . . shall reject in writing the coverage or select lower limits.

(La.R.S. 22:1406(D)(1)(a). *See also, Capone v. King*, 467 So.2d 574, 579 (La.App. 5 Cir. 1985); *Babin v. State Farm Mut. Auto. Ins. Co.*, 504 So.2d 558, 559 (La.App. 1 Cir. 1986). Thus, since uninsured motorist coverage was not waived in writing in the USF & G policies at issue here, uninsured motorist coverage is statutorily included under the USF & G liability policies in question.

[6] The hired autos section of the policy excludes from coverage vehicles borrowed from employees of Browne-McHardy. Dr. Ureta, however, was not an employee of Browne-McCardy (sic) Clinic. Rather he was an employee of Ureta, APMC which corporation was, in turn, a partner of the Browne-McHardy Clinic. Therefore, Dr. Ureta would not come under the employee exclusion to the hired auto coverage in the USF & G policy.

[7] *See Winters v. Highlands Ins. Co.*, 569 F.2d 297, 299 (5th Cir. 1978) (stating that whether the driver, at the time of the accident,

The "non-owned autos" section of the USF & G policy provides coverage for,

> those autos you (Browne-McHardy) do not own, lease, hire, or borrow which are used in connection with your business. This includes autos owned by your employees or members of their households but only while used in your business or personal affairs.

Thus, for Dr. Ureta to be covered under this section of the policy, Dr. Ureta would have to have been driving a car that was not owned, hired, or borrowed by the named insured, Browne-McHardy Clinic, but was being used in connection with Browne-McHardy's business. If Dr. Ureta was to attend the birthday party for Browne-McHardy business purposes, then his car would have to be considered either "borrowed" by Browne-McHardy and, therefore, covered under the "hired autos" section discussed above, or else it could be considered "not borrowed but used in connection with Browne-McHardy business" and, therefore, covered under the "non-owned autos" section of the policy. In either case, if Dr. Ureta was to attend the party in connection with Browne-McHardy business, then the car would be a covered vehicle at the time of the accident. As discussed above, whether Dr. Ureta was to attend the party "in connec-

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was on a mission contemplated by his employer was a question of fact, and stating further that, "summary judgment may be improper even though the basic facts are undisputed if the parties disagree regarding the material factual inferences that properly may be drawn from these facts"); *Chaisson v. Domingue*, 372 So.2d 1225 (La.1979) (holding that whether a teacher was in the course and scope of her employment when attending an extracurricular band concert was a question of fact); *Robinson v. Estate of Haynes*, 433 So.2d 294, 297 (La.App. 1st Cir.1983) (stating that, "It is well settled that whether an employee is in the course and scope of employment is a question of fact . . . . This question of fact precludes any granting of summary judgment."); *Bell v. Baird*, 431 So.2d 27, 28 (La.App. 1st Cir.1983) (stating that a determination whether an insured was "actively at work" at the time of the accident was a question of fact precluding summary judgment).

tion with Browne-McHardy business" presents a genuine issue of material fact precluding summary judgment.

Finally, the appellant argues, Dr. Ureta should be covered by the USF & G policies for the accident in question because Ureta, APMC was listed as a partner for whom an additional $68 liability insurance premium was paid as stated on the partnership endorsement to the USF & G policies. That endorsement reads, in relevant part:

> No auto owned by any of your partners or members of their households is a covered auto for liability insurance unless a premium is shown in this endorsement.

Thus, since a premium is shown for Ureta, APMC in the endorsement, any auto owned by Ureta, APMC would be covered for liability insurance under the policy. But the vehicle in question was owned not by the partner, Ureta, APMC, for whom the $68 premium was paid. Rather, the vehicle was owned by Dr. Ureta personally. Therefore, it would appear that the vehicle in question was not covered by the partnership endorsement. It would, thus, appear that the $68 was paid for coverage of no particular vehicle unless it can be said that any "hired" or "non-owned" vehicle used by Ureta, APMC was covered. In that case, Dr. Ureta would have been covered at the time of the accident. But this Court need not decide this issue. Rather, it is sufficient that we find that, if Dr. Ureta was driving his car on Browne-McHardy related business, then Dr. Ureta was covered under the "hired auto" provision and the "non-owned auto" provision of the USF & G policies.

IV

A genuine issue of material fact is posed by the question whether Dr. Ureta was to be engaged in Clinic-related business at the birthday party to which he was

driving at the time of the accident. If he was to attend the party in connection with Browne-McHardy business, then he would be covered by the "hired auto" and the "non-owned auto" provisions of the USF & G policies. We hold, therefore, that the district court erred in dismissing USF & G from this case on summary judgment. The summary judgment is REVERSED and this case is REMANDED to the district court for determination of the factual issue presented and for appropriate judgment.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-2916

ANNE A. URETA, *et al.*

versus

KATHE THOMPSON, *et al.*

OPINION AND ORDER

[Entered Nov. 18, 1988]

Plaintiff Anne Ureta is the widow of Dr. Segismundo Z. Ureta. Dr. Ureta was killed on the Mississippi River Bridge when defendant Matthew Brown's automobile strayed across the center lane of the bridge and struck Dr. Ureta's car head-on.

As a result of this accident, plaintiff sued several defendants including the Untied [sic] States Fidelity & Guaranty Insurance Co. ("USF&G"). She alleges, among other things, that at the time of the accident a USF&G uninsured motorist ("UM") policy covered either the decedent's automobile, or the decedent.

USF&G today moves for summary judgment. It maintains that there remains no genuine issue of fact regarding insurance coverage. Because USF&G issued the disputed policy to the Browne-McHardy Clinic ("Clinic") rather than to Dr. Ureta, USF&G argues that the policy simply did not provide UM coverage to Dr. Ureta.

Plaintiff also moves for summary judgment. She, however, argues that there is no genuine dispute that the

USF&G policy *did* provide UM coverage to her deceased husband.

I. *Opinion*

A. *Standard for Summary Judgment*

Federal Rule of Civil Procedure 56(c)[1] governs summary judgment. This rule "mandates the entry of summary judgment, after adequate time for discovery[2] and upon motion, against a party who fails to make a showing sufficient to establish the existence of a [material fact] . . . which that party [must prove] at trial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986) (citing Fed. R. Civ. P. 56(c)).

1. *Materiality.*—The controlling substantive law governs which facts are material. *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). Only disputes "over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* Others are irrelevant.

2. *Genuineness.*—Summary judgment "will not lie if the dispute about a material fact is "genuine." *Id.* The Supreme Court considers a dispute "genuine" if the evidence is such that a reasonable jury could return a verdict on that issue for "either party." *Id.* at 2511.

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[1] Rule 56(c) expressly states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c).

[2] If it appears that the nonmoving party is being "'railroaded' by a premature motion for summary judgment," the court should deny the motion, or continue it until the nonmoving party has adequate opportunity to make full discovery. Fed. R. Civ. P. 56(f); *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554-55 & 2554 n.6 (1986).

When the movant is the defendant,[3] the *movant* initially need only make a " 'showing'—that is, pointing out to the District Court—that there is an *absence of evidence* to support the nonmoving party's [the plaintiff's] case." *Celotex* 106 S.Ct. at 2554 (emphasis added); *see also id.* at 2557 (Brennan, J., dissenting); *Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Manuf. Co.*, 812 F.2d 219, 222 (5th Cir. 1987); *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986). However, a "showing" is more than a conclusory allegation; the movant must affirmatively demonstrate the absence of evidence in the record. *Id.* at 2553; *id.* at 2557 (Brennan, J., dissenting). But in no event must the movant produce affidavits or other new evidence negating the nonmovant's claim. *Id.* at 2553.

If the defendant-movant successfully makes such a "showing," the plaintiff-nonmovant may oppose the motion with any of the kinds of evidence listed in Rule 56(c).[4] *Id.* at 2553-54. The nonmovant need not produce admissible evidence. *Id.* However, the nonmovant must go beyond the pleadings to designate specific disputed facts; the nonmovant must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 106 S. Ct. at 1356. If the plaintiff fails to do so, the court must grant summary judgment.

If the plaintiff-nonmovant *does* make the requisite "showing," however, the court then must decide by a preponderance whether summary judgment is appropriate. The *defendant-movant* has the burden of proving that there is no genuine issue of fact, *Anderson*, 106 S. Ct. at 2514, and that it is entitled to judgment as a matter of law. *Id.*; *see also Williams v. Adames*, 836 F.2d 958, 960

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[3] As USF&G is in the present case.

[4] *See supra* note 1.

(5th Cir. 1988); *Thomas v. Harris County*, 784 F.2d 648, 651 (5th Cir. 1986).

B. *The Standard Applied to the Insurance Coverage Issue*

1. *Materiality.*—Plaintiff claims that the Clinic insurance policy issued by USF&G was applicable to her husband on the day of his death. Because insurance coverage is clearly a material issue in a suit between an insured and his insurer, this opinion will consider only whether a genuine issue regarding coverage remains.

2. *Genuineness*

a. *Was Dr. Ure'a's Automobile Covered?*—The USF&G Browne-McHardy Clinic policy lists three classes of automobiles covered for *liability.*[5] Those classes include the following: (1) "specifically described autos," (2) "hired autos," and (3) "nonowned autos." *See* USF&G-Clinic Business Auto Policy at 1 [hereinafter BAP].

(1) *Specifically Described Autos.*—The "specifically described" provision covers autos (for liability and UM coverage) that the policy specifically lists. The plaintiff concedes that the USF&G policy clearly did not "specifically" describe Dr. Ureta's car. Therefore, there is no genuine issue here; this provision does not support plaintiff's theory.

(2) *Hired Autos.*—The "hired autos" provision of the BAP covers automobiles (for liability) that are "lease[d], hire[d], rent[ed] or borrow[ed]" by the insured (Brown-McHardy Clinic). There is no evidence in the record that

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[5] The UM provision only covers "specifically described" automobiles. However, out of an abundance of caution this opinion assumes that USF&G owes UM coverage to Dr. Ureta to the same extent that it would owe him liability insurance. Therefore, if the liability policy provisions do not apply to Dr. Ureta, then neither do the UM provisions.

the Clinic "borrowed" Dr. Ureta's car on July 13, 1986 for Clinic business. When the accident occurred, Dr. Ureta was not on call. Deposition of Mrs. Ureta at 68. Moreover, Mrs. Ureta and her husband were en route to a "totally . . . social" birthday party for a friend's son. *Id.* Mrs. Ureta admitted this in her November 4, 1987 deposition:

> Q: This was totally a social event that you [and Dr. Ureta] were going to attend that particular day?
>
> A: Right.
>
> Q: It had nothing to do with business at Browne-McHardy Clinic?
>
> A: It had nothing to do with Browne-McHardy Clinic.

Id.; see also id. at 45-49.

Moreover, even if Dr. Ureta's car did qualify as a "hired auto," because he is an employee-member of the partnership, the BAP's "hired autos" provision excludes him. *See* BAP Description of Covered Auto Designation Symbols.

For these reasons, there is no genuine issue whether the "hired autos" provision supports plaintiff's theory. It clearly does not.

(3) *Nonowned Autos.*—The "nonowned autos" provision of the BAP refers to "autos [the Clinic does] not own, lease, hire or borrow which are used in connection with [the Clinic's] business. This includes autos owned by [Clinic] employees or members of their households but only while used in [Clinic] business or [Clinic] personal affairs." *See* BAP Description of Covered Auto Designation Symbols.

However, because the BAP covers a partnership in this instance, an endorsement negates this "nonowned autos" provision. That endorsement is entitled "Partnership as Named Insured—Non-Ownership Liability Coverage."

Plaintiff maintains that the endorsement is abstruse, and its effect is uncertain. Thus, plaintiff suggests that summary judgment on the coverage issue is inappropriate.

The court, however, finds no such ambiguity. Read in context with the entire policy, the "Partnership as Named Insured—Non-Ownership Liability Coverage" endorsement is clear; it simply negates the "nonowned autos" provision of the standard policy. But it also provides that a partnership can "negate the negation" by paying a premium on its partners' cars. The Clinic did this. Thus the "nonowned autos" provision was in force.

The "nonowned autos" provision covers "autos [that the Clinic does] not own, lease, hire or borrow which are used in connection with [the Clinic's] business. This includes autos owned by [Clinic] employees or members of their households but only while used in [Clinic] business or [Clinic] personal affairs." *See* BAP Description of Covered Auto Designation Symbols. There is no genuine issue regarding what Dr. Ureta was using his automobile for on July 13, 1986—to attend a purely social birthday party. *See* Deposition of Mrs. Ureta at 68. He was not using his car for "for [Clinic] business or [Clinic] personal affairs." Therefore, there is no genuine issue of fact regarding whether the "nonowned autos" provision of the BAP applies. It does not.

3. *Was Dr. Ureta Covered Despite That His Automobile Was Not?*—The only potential coverage issue that remains lies in the UM endorsement of the Clinic's policy. The UM endorsement of the BAP provides that "you or any family member" is covered by the UM provision of the policy. This endorsement applies regardless of whether a "covered" automobile is involved in the accident. Although the term "you" clearly refers to the Clinic, *see* BAP at 1, the plaintiff suggests that it also refers to the members of the Clinic partnership; she maintains that "you or any family member" includes Dr. Ureta. USF&G maintains that it does not.

UM provisions are not uncommon in business automobile policies. In interpreting corporate UM policies, Louisiana courts have generally found coverage only when an employee is injured in the course and scope of employment. *See, e.g., Vera v. Centennial Ins. Co.*, 483 So. 2d 1166 (La. Ct. App. 5th Cir. 1986); *Capone v. King*, 467 So. 2d 574 (La. Ct. App. 5th Cir. 1985); *Soffel v. Bamburg*, 478 So. 2d 663 (La. Ct. App. 2d Cir. 1985). In the present case, Dr. Ureta was clearly injured outside the scope of his employment. Were the Clinic a corporation, the "Business Auto Policy" probably would not have covered Dr. Ureta's death. However, the insured party here —the "you" in the policy—is a partnership rather than a corporation. Because a partnership is essentially an aggregation of individuals, the plaintiff proposes that the "you" in the policy includes Dr. Ureta individually.

While plaintiff's argument is clever, it is unsubstantiated; there is no evidence that either the Clinic or USF&G ever intended the UM endorsement to cover every individual member of the partnership, and every member of their respective families. This court must examine the UM endorsement in the context of the entire policy. The policy is a "Business Automobile Policy." In this context, there exists no genuine issue regarding whether the UM endorsement covers Dr. Ureta for an accident that occurred in his own car, while en route to a purely social birthday party. It does not.[6]

USF&G has established by a preponderance of the evidence that there is no genuine issue of fact regarding the material insurance coverage issue. *See Anderson*, 106 S. Ct. at 2514. It, therefore, is entitled to summary judgment as a matter of law. *Id.*

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[6] Furthermore, Dr. Ureta was not a member of the Clinic partnership—his professional corporation was. Because Dr. Ureta was not acting in his corporate capacity when he was killed (he was on the way to a birthday party), he arguably has no right to recover under the UM provision of the Clinic policy.

II. *Order*

USF&G's motion for summary judgment is GRANTED. Plaintiff's cross-motion for summary judgment is DENIED. USF&G is directed to submit an order consistent with this minute entry.

/s/ Peter Beer
PETER BEER
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-2916

ANNE ANDRAKE URETA, widow of SEGISMUNDO Z. URETA, Individually and on behalf of her minor children, SEAN URETA and STEVEN URETA

versus

KATHE THOMPSON, individually and as Administratrix of the Estate of her minor child, MATTHEW D. BROWNE, PRUDENTIAL PROPERTY & CASUALTY COMPANY, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY

RULE 54(b) JUDGMENT

[Entered Nov. 28, 1988]

An Order having been entered herein on November 18, 1988, granting the Motion for Summary Judgment filed by defendant, United States Fidelity & Guaranty Company, denying the Cross Motion for Summary Judgment filed by plaintiff, all for the reasons contained therein, and additionally, in light of the Court's finding that the Comprehensive Excess Policy also issued by United States Fidelity & Guaranty Company provides no coverage to the plaintiff, for the same reasons whereby the Court concluded that defendant's Basic Automobile Policy did not afford coverage, and the Court now expressly determining that there is no just reason for delay in entering final judgment dismissing this action as to the defendant, United States Fidelity & Guaranty Company.

IT IS ORDERED, ADJUDGED AND DECREED that the Complaint filed herein on behalf of plaintiff, Anne Andrake Ureta, widow of Segismundo Z. Ureta, individually and on behalf of her minor children, Sean Ureta and Steven Ureta, be and it is hereby dismissed with prejudice, as against defendant, United States Fidelity & Guaranty Company, each party to pay their own costs. New Orleans, Louisiana, this 28th day of November, 1988.

/s/ Peter Beer
PETER BEER
Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-2916

ANNE A. URETA, *et al.*

versus

KATHE THOMPSON, *et al.*

MINUTE ENTRY, 12/08/88

[Entered Dec. 9, 1988]

Plaintiff Anne Ureta is the widow of Dr. Segismundo Z. Ureta. Dr. Ureta was killed on the Mississippi River Bridge when defendant Matthew Brown's automobile strayed across the center lane of the bridge and struck Dr. Ureta's car head-on.

As a result of this accident, plaintiff sued several defendants including the Untied [sic] States Fidelity & Guaranty Insurance Co. ("USF&G"). She alleged, among other things, that at the time of the accident a USF&G uninsured motorist ("UM") policy covered either the decedent's automobile or the decedent.

On November 18, 1988, this court granted summary judgment in favor of USF&G because there remained no genuine issue of fact regarding insurance coverage. The plaintiff has moved for the court to reconsider this ruling.

The plaintiff has presented no new arguments or evidence that would cause this court either to reconsider its November 18, 1988 order, or to vacate its subsequently

entered judgment. Therefore, the court must DENY plaintiff's Motion for Reconsideration.[1]

/s/ Peter Beer
PETER BEER
United States District Judge

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[1] Oral argument currently set for Wednesday, December 14, 1988 is therefore CANCELLED.

APPENDIX E

February 2, 1990

Mr. Gilbert F. Ganucheau
Clerk, U. S. Court of Appeals
for the Fifth Circuit 08819/02222-PAF
600 Camp Street
New Orleans, Louisiana 70130

Attention: Miss Joan Perkins

Re: Ureta v. Thompson and USF&G,
Fifth Cir. No. 88-3938

Dear Mr. Ganucheau:

We confirm our telephone conversation with Miss Joan Perkins of your office in which we requested and were granted a 14-day extension of time from Thursday, February 8, 1990, up to and including Thursday, February 22, 1990, within which to file a Petition for Rehearing and/or Suggestion for Rehearing En Banc on behalf of Appellee, United States Fidelity & Guaranty Company.

Undersigned counsel is in need of this extension so that he may consult with his client on matters concerning this Petition. In addition, this extension is requested because undersigned counsel is presently involved in preparation of an appellate brief before this Court.

Thanking the Court for its usual consideration, we remain

Very truly yours,

CHAFFE, MCCALL, PHILLIPS,
TOLER & SARPY

/s/ Kenneth J. Servay
KENNETH J. SERVAY

KJS/csr
cc: Mr. T. Peter Breslin

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3938

ANNE ANDRAKE URETA,
Widow of SEIGISMUNDO Z. URETA, Individually, Etc.,
Plaintiff-Appellant,

versus

KATHY THOMPSON, Individually and as Administratrix
of the Estate of Her Minor Child, *et al.*,
Defendants,

UNITED STATES FIDELITY & GUARANTY CO.,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion JANUARY 25, 1990, 5 Cir., 198 , —F.2d—)

(March 12, 1990)

Before WISDOM, JOHNSON and HIGGINBOTHAM,
Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 87-2916

ANNE ANDRAKE URETA, *et al.*

versus

KATHY THOMPSON, *et al.*

Testimony of ANNE ANDRAKE URETA, taken by DEFENDANTS, pursuant to notice, at the law offices of Chaffe, McCall, Phillips, Toler and Sarpy, 2300 Energy Centre, New Orleans, Louisiana, 70113, on November 4, 1987.

[2] APPEARANCES:

For the Plaintiffs:

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DAN R. DORSEY, ESQ.

For Prudential Property and Casualty:

SIMON AND REES
Attorneys At Law
1320 First National Bank of Commerce Building
New Orleans, Louisiana 70112
By: KATHLEEN E. SIMON, ESQ.

[3] STIPULATION

It is stipulated and agreed by and among the various parties that the testimony of the witness may be taken by Defendants, pursuant to notice, at the time and place hereinbefore noted; that the testimony of the witness may be taken down in shorthand (Stenotype) by PAUL W. WILLIAMS, and by him transcribed, the formalities of signing, sealing, certification and filing being waived, and all objections, save objections to the form of the question, being reserved to the time of trial.

It is further stipulated that the witness may be sworn by Paul W. Williams, Certified Shorthand Reporter, in and for the State of Louisiana.

[4] ANNE ANDRAKE URETA,

having been first duly sworn, was examined and testified as follows:

EXAMINATION BY MR. FERINGA:

Q. Would you give me for the record your full name, please, ma'am?

A. Anne, A-n-n-e, middle name Lee, maiden name Andrake, A-n-d-r-a-k e, last name Ureta.

Q. And you live where, please, ma'am?

A. 138 Chateau LaTour Drive; that is in Kenner, 70065.

Q. Your telephone number, please?

A. 466-5420.

Q. And you have lived at that address for how long?

A. Oh, it will be ten years in February.

Q. And who lives there at that address with you today?

A. I have two children: Sean, S-e-a-n, and Steven, S-t-e-v-e-n.

Q. And Sean is how old?

A. Seventeen.

Q. And Steven is how old?

A. Thirteen.

* * * *

[45] Q. Ten to 4:30 or ten to five, always?

A. Usually, not always, at the clinic, at Browne-McHardy Clinic, at Browne-McHardy Clinic there on Houma.

Q. That clinic is the one that is immediately north or on the Lake side of East Jefferson, correct?

A. It is really right beside East Jefferson, yes.

Q. Now, and then from 4:30 until five, would he catch up on paperwork?

A. On phone calls, usually.

Q. And then he would probably leave usually around 6:30, get home around seven?

A. Usually, but sometimes he would go to the hospital, you know, if he had anybody admitted.

Q. Make another round on some patients?

A. Maybe some he admited in the morning or maybe he admitted that afternoon or maybe had a consultation.

Q. On the day of the accident, where were you going that day?

A. We were going to a party across the River, probably in Algiers.

[46] Okay.

A. It was a birthday party for a friend's son.

Q. Were your children with you?

A. No.

Q. Okay.

A. I had one at the time in Washington, D.C., and he was at a debate camp.

Q. That would be the oldest one?

A. And my other son went with a friend to the—a tour of the Superdome.

Q. Okay. Who was the one in Washington?

A. Sean was in Washington, D.C., and Steven was with a friend.

Q. The reason I asked that question, you said it was a birthday party for the son of a friend, but apparently, it was a birthday party for someone who was not necessarily a friend of your two boys?

A. It was, but it was one of the situations where—where it was a Filipino friend, and we were going there. Sometimes Filipinos get their feelings hurt if you don't—if [47] you're invited somewhere, and you don't go, you know, so we just had to go, because she had invited us one other time and we could not go, so we felt like maybe her feelings would be hurt if we did not come and eat lunch and eat there, even though our children were not with us.

Q. Whose birthday party, who were the parents that you were going to go visit that day?

A. The Abads, A-b-a-d.

Q. A-b-a-d?

A. Uh-huh.

Q. And is he a doctor?

A. No.

Q. Do you remember the first name?

A. I really can't remember her husband's name, but her name is Charing, and I really have a mental block for his first name. Filipino names are not easy to remember.

Q. Okay. Now, this birthday party was going to have lunch served?

A. Uh-huh.

[48] Q. And there were going to be a number of people there?

A. Yes, uh-huh.

Q. What time were you-all intending to arrive at that party, approximately?

A. Oh, I'm trying to think now. We left the house probably after three, so it—it is one of these things that —they have a thing called Filipino time, you can drop in any time. It can be from two o'clock to six o'clock, so we were going to—

Q. You left your house about three p.m., and you were intending to arrive there at whatever time it took to drive over there, about twenty-five or thirty minutes?

A. Yes.

Q. Something like that, okay. And then you were going to obviously participate in the Filipino birthday party and then you were planning to do what, go home?

A. Go home, right.

Q. Your husband, I presume, therefore was not [49] on call that day?

A. Right. He was not on call.

Q. He was not on call?

A. No.

Q. So he had that day completely off? When you're not on call, you're completely off, and he does not even carry a beeper with him, does he, when he is off duty?

A. No, he does not carry a beeper when he is off.

Q. There would be no way for anybody—

A. Until he got back home.

Q. Until he got back home, they couldn't reach him, because nobody knew where you were?

A. Right.

Q. Okay. I know this may be traumatic for you, but if you don't mind just go ahead and tell us what happened. I don't need the details of the trip coming in, but what happened as you-all were involved in the accident, as best you can recall it?

A. Okay, we were going toward the West Bank,

* * * *

[68] A. Abad.

Q. You said you were going to visit them for the birthday party. Did they have any connection with Browne-McHardy Clinic, in other words, was he an employee or was she an employee?

A. No.

Q. They were strictly friends of your husband's that he had known what, in the Philippines?

A. No, we had just met them here. There is a big Filipino community here, and we met them through maybe one of the organizations.

Q. This was totally a social event that you were going to attend that particular day?

A. Right.

Q. It had nothing to do with business at Browne-McHardy Clinic?

A. Right.

Q. No, it had nothing to do with Browne-McHardy Clinic?

A. It had nothing to do with Browne-McHardy Clinic.

[69] Q. Let me ask you a question about your other automobiles and the insurance on the other cars. I haven't seen the policies, but let me ask you some questions now, and it would be subject to the policies.

(Discussion off the record)

MR. ABEL: Just note my objection for the record.

MR. FERINGA: Sure, whatever the policy shows.

Q. My understanding is from your testimony you had two other automobiles, this 1982 Buick Estate Wagon and a 1979 Buick Riviera. That would make a total of three cars?

A. Yes, sir.

Q. Were all three cars insured by State Farm?

A. Yes, uh-huh.

Q. Were they on one policy? I don't know how State Farm does it, or three separate policies?

A. Three separate policies.

* * * *

APPENDIX H

PLAINTIFF'S EXHIBIT A

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary Public, personally came and appeared: JOHN T. PATTERSON, M.D. who after first being duly sworn by me, Notary, did depose and say:

That he is a partner in the professional medical partnership of Brown McCardy Clinic. That as a physician with the Brown McCardy Clinic, at all partnership meetings the issue of solicitation of business is discussed, and all partners are expected to actually engage in soliciting prospective patients for the clinic. It is customary at each partnership meeting that the issue of solicitation be discussed to emphasize the importance to the practice and to keep it at the forefront of the partners attention. In furtherance of this goal, the partnership encourages the partners to engage in a wide range of professional and social activities, many of which are of a semi-personal nature, all with a dominant purpose of creating good will to generate new patients thus furthering the business of the medical partnership.

The partners are given wide latitude in carrying out their duties to solicitate and generate new patients on behalf of the partnership. In determining potential business opportunities in a variety of settings, each partner exercises personal discretion. The partnership is aware and expects that many of these activities engaged in by the partners for the purpose of generating new business, are of a personal or semi-personal nature. The partnership recognizes that such social settings are conducive to the creation of good will towards the partnership. Con-

sidering the economic benefit derived by the partnership through these contacts, the affiant believes that most if not all of the activities engaged in furtherance of this purpose are employment connected.

The affiant states that the partners/physicians remain available at all times to be called by the clinic through the physician call system whether actually "on call" or in a back up capacity.

The affiant further states that partners/physicians are available and stand ready at all times to render needed medical services.

/s/ John T. Patterson, M.D.
JOHN T. PATTERSON, M.D.
Affiant

Sworn to and Subscribed Before Me,
This 17th Day of March, 1987.

/s/ David R. Sherman
DAVID R. SHERMAN
Notary Public

PLAINTIFF'S EXHIBIT B

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary Public, personally came and appeared: KEITH E. LARKIN, M.D. who after first being duly sworn by me, Notary, did depose and say:

That he is a partner in the professional medical partnership of Brown McCardy Clinic. That as a physician with the Brown McCardy Clinic, at all partnership meetings the issue of solicitation of business is discussed, and all partners are expected to actually engage in soliciting prospective patients for the clinic. It is customary at each partnership meeting that the issue of solicitation be discussed to emphasize the importance to the practice and to keep it at the forefront of the partners attention. In furtherance of this goal, the partnership encourages the partners to engage in a wide range of professional and social activities, many of which are of a semi-personal nature, all with a dominant purpose of creating good will to generate new patients thus furthering the business of the medical partnership.

The partners are given wide latitude in carrying out their duties to solicitate and generate new patients on behalf of the partnership. In determining potential business opportunities in a variety of settings, each partner exercises personal discretion. The partnership is aware and expects that many of these activities engaged in by the partners for the purpose of generating new business, are of a personal or semi-personal nature. The partnership recognizes that such social settings are conducive to the creation of good will towards the partnership. Considering the economic benefit derived by the partnership

through these contacts, the affiant believes that most if not all of the activities engaged in furtherance of this purpose are employment connected.

The affiant states that the partners/physicians remain available at all times to be called by the clinic through the physician call system whether actually "on call" or in a back up capacity.

The affiant further states that partners/physicians are available and stand ready at all times to render needed medical services.

/s/ Keith E. Larkin, M.D.
KEITH E. LARKIN, M.D.
Affiant

Sworn to and Subscribed Before Me,
This 13 Day of March, 1987.

/s/ Steven E. Hayes
STEVEN E. HAYES
Notary Public

PLAINTIFF'S EXHIBIT C

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned Notary Public, personally came and appeared ANNE ANDRAKE URETA, who after first being duly sworn by me, Notary, did depose and say:

That she is the widow of Segismundo Z. Ureta who died as the result of injuries he sustained in a head-on collision with a vehicle driven by Matthew Browne on the Mississippi River Bridge on July 13, 1986;

That her husband was a physician and was a partner of, and worked for, the Browne-McHardy Clinic;

That as a physician, her husband was always available to render medical services, regardless of whether or not he was officially "on-call"; that he often received telephone calls at home on his day off and the weekends; that he made his personal telephone available to his patients, and told them "If you need me, call me";

That Dr. Segismundo Z. Ureta was the sole owner, operator and only officer and employee of his professional medical corporation;

That the 1987 Nissan which Dr. Ureta was driving when the accident occurred was purchased for his use and was the vehicle which he used in his business;

That Dr. Ureta was active in the Filipino community and developed many patients through his friendships and contacts and word of mouth within the community.

/s/ Anne Andrake Ureta
ANNE ANDRAKE URETA

Subscribed and Sworn Before Me
This 7th Day of Jan. 1988.

/s/ Patricia Mandina McCullough
Notary Public

PLAINTIFF'S EXHIBIT D

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: MRS. ANNE URETA of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That her husband, Dr. Segismundo Z. Ureta was very active in the Filipino community and he belonged to a number of organizations, including the Association of Philippine Physicians in America, the Philippine American United Council of Louisiana, the Philippine American Sports Association of New Orleans, and the choral group of the Philippine-American Women's Association of Louisiana.

In addition to these formal organizations, he participated in many social functions sponsored by members of the community, and some of his patients were established through these contacts.

/s/ Anne Ureta
ANNE URETA

Sworn to and subscribed before me,
this 5th day of Nov. 1988.

/s/ Patricia Madina McCullough
Notary Public

PLAINTIFF'S EXHIBIT E

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: MRS. AGRIPINA SISON of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That she met Dr. Ureta through the Philippine community;

That he was very active in Philippine Community organizations;

That Dr. Ureta was her family doctor, and he treated her, her husband, TEOFILO SISON, and her daughter, LINDA SISON;

That she was present at the Abad party, on July 13, 1986;

That she had recommended Dr. Ureta to other potential patients in the Philippine community.

/s/ Agripina Sison
AGRIPINA SISON

Sworn to and subscribed before me,
this 7th day of Nov., 1988.

/s/ Patricia Mandina McCullough
Notary Public

PLAINTIFF'S EXHIBIT F

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: MRS. MAGBALENA LIBRON of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That she met Dr. Ureta through the Philippine community;

That he was very active in Philippine community organizations;

That she was a patient of Dr. Ureta, and he treated her at the Browne-McHardy Clinic;

That Dr. Ureta had many Philippine patients;

That Dr. Ureta was a very conscientious doctor and was always available to his patients, and not only treated them at Brown-McHardy, but would also make house calls if his patients were ill;

That Dr. Ureta always had time for his patients and for the Philippine community.

/s/ Magdalena Libron
MAGBALENA LIBRON

Sworn to and subscribed before me,
this 5th day of Nov., 1988.

/s/ Patricia Mandina McCullough
Notary Public

PLAINTIFF'S EXHIBIT G

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: MRS. AMELIA VILLANUEVA HAYDEL of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That Dr. Ureta was her family doctor since her teen-age days;

That he treated her mother and father, as well as the children at Browne-McHardy Clinic;

That her mother referred others to Dr. Ureta;

That she knows Dr. Ureta derived professional contacts through the various Philippine organizations to which he belonged, and the social activities in which he participated.

/s/ Amelia Villanueva Haydel
AMELIA VILLANUEVA HAYDEL

Sworn to and subscribed before me,
This 8th day of Nov., 1988.

/s/ Patricia Mandina McCullough
Notary Public

PLAINTIFF'S EXHIBIT H

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: MRS. ROSARIO ABAB of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That she gave a birthday party for her son's twelfth birthday on July 13, 1986, at her home on the westbank, at 2612 Mercedes Boulevard;

That Dr. and Mrs. Ureta were en route to the party when the accident occurred;

That she is active in the Filipino community, and belongs to a number of Philippine associations;

That most of the guests that she invited to the party were from the Philippine community;

That Dr. Ureta was very active in the Philippine community;

That she referred several Filipino merchant marine seaman to Dr. Ureta at the Browne-McHardy Clinic.

/s/ Rosario D. Abad
ROSARIO ABAD

Sworn to and subscribed before me,
this 7th day of Nov., 1988.

/s/ Patricia Mandina McCullough
Notary Public

PLAINTIFF'S EXHIBIT I

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF JEFFERSON

BEFORE ME, the undersigned authority, personally came and appeared: F. J. VALEN, M.D. of the full age of majority, and a resident of the Parish of Jefferson, State of Louisiana, who upon being first duly sworn, did depose and state:

That he is active in the Flipino community, as was Dr. Ureta, and both belonged to a number of Philippine associations, including the Association of Philippine Physicians in America;

That he did not personally attend the party at Mrs. Abab's home on July 13, 1986, but his children were invited;

That these types of social events are a good source of business and indirectly help one's medical practice;

That from time to time he had referred patients to Dr. Ureta at Browne-McHardy.

/s/ F. J. Valen, M.D.
F. J. VALEN, M. D.

Sworn to and subscribed before me,
this 7th day of Nov., 1988.

/s/ Patricia Mandina McCullough
Notary Public

APPENDIX I

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the mov-

ing party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 81. Applicability in General

* * * *

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings

have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within 10 days after the petition for removal is filed if the party is the petitioner, or if not the petitioner within 10 days after service on the party of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury.—

* * * *

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Apr. 30, 1951, eff. Aug. 1, 1951; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987.)